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No. 667

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

JOHN CARLSON,
Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

BRIEF FOR ROSS W. SWING AS AMICUS CURIAE.

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel.

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IN THE

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BRIEF FOR ROSS W. SWING AS AMICUS CURIAE.

This case and the case of *Thornhill* v. *State*, No. 514, both of which are now before this Court, involve similar basic principles. A decision by this Court in these cases will have an immediate bearing and effect upon similar legislation in other States, and in addition thereto, the possible result in thousands of civil cases now pending in the courts of several States. Ross W. Swing is one of the plaintiffs in a cause now pending in the courts of review in the State of Illinois. The subject matter of his suit and the questions involved have been before this Court in Case No. 615, entitled *American Federation of Labor, et al.* v. *Ross W. Swing, et al.*, in which certiorari was denied by this Court for want of final order on February 5, 1940. Since the entry of this order a final decree has been entered in the courts of Illinois.

STATEMENT OF THE CASE.

We are compelled to take the liberty of restating the facts because a complete statement of the facts does not appear in any of the briefs filed by the parties.

Appellant (who will hereafter be referred to as defendant) was charged by criminal complaint with violating an ordinance entitled as an "Anti-Picketing Ordinance." The complaint charged him with picketing in violation of the ordinance (Rec. p. 1). The transcript of record shows that all of the parties to the action, as well as the State courts, treated this ordinance as being an ordinance which prohibited picketing. The defendant was found guilty and directed to pay a fine imposed (Rec. p. 67).

The Justice of the Peace before whom the case was tried (Rec. p. 67) did not render any opinion. Neither did the court of review (Rec. p. 73). The court of review (Rec. p. 74) said that in the absence of any decision or opinion of the higher courts of review in the State, it would not take it upon itself to construe the ordinance as to its purpose, effect and constitutionality.

The briefs filed on behalf of the parties and the brief filed by the American Civil Liberties Union as *amicus curiae* fail to call to the attention of this Court all of the provisions of the ordinance in question; nor do they in their briefs discuss or allude to all of the contemporary conditions in the community at the time of the passing of the ordinance or at the time of the alleged violation thereof. The ordinance was passed on April 4, 1938. It is reasonably inferred from the record that Shasta County, in the State of California, prior to April 4, 1938, was mainly an agricultural community. Shortly prior to that date the federal government had undertaken a water project known

as the Central Valley Water Project for the purpose of making the Sacramento River navigable up to the City of Redding (the county-seat of Shasta County). In so doing, it became necessary to relocate the tracks of the Southern Pacific Railroad in Shasta County and to build tunnels. A contract for the construction work was let by the United States Bureau of Reclamation (Rec. pp. 23, 35) to the United Concrete Pipe Corporation. Preliminary work was commenced on January 26, 1939, when the contractor hired some twenty-nine men (the defendant included) to clear away brush so that a spur track could be placed on the premises (Rec. p. 30). The defendant came to work on that day and worked until February 2, 1939, when the job was shut down because of weather conditions, and all of the men, including the defendant, were laid off (Rec. p. 30). A few days prior to February 2nd an organizer for the American Federation of Labor local union came on the premises and sought to obtain membership applications from the defendant and his co-workers. On the day they were laid off and discharged, the defendant and twenty-eight others got together in a group and took a vote as to whether they would become members of the American Federation of Labor local union or the Committee on Industrial Organization local union. The record is silent on the question as to when the C. I. O. local union tried to organize the men; but it can be reasonably inferred from the record by the fact that the men took a vote on February 2nd as to which union they would join, that an attempt was made prior to February 2nd to bring the men into the C. I. O. local union. The defendant himself apparently held a card in the C. I. O. union but was on the delinquent list on February 2nd (Rec. p. 32). It is clear from a reading of the record that the defendant and all others were discharged on February 2nd or "laid off,"

as he put it, not due to any union affiliation but solely because of weather conditions. It also appears that the defendant and all of his co-workers were not hired under a definite contract but on an "at will" basis. During the weeks succeeding February 2nd, the organizers for the C. I. O. union as well as the A. F. of L. union sought recognition as the bargaining agency for the employees; apparently a controversy arose as to which of the trade unions (A. F. of L. or C. I. O.) was going to act as the bargaining agency for the employees. At that time the job was closed down and nobody was working. One week later work again commenced but was immediately shut down because the two labor unions had taken their complaints to the Governor of the State (Rec. p. 33) for arbitration. After several weeks of attempts at arbitration by the officials of the State government, the job reopened and new employees were hired; these men were members of the A. F. of L. local union, and the defendants immediately thereafter started to picket. The picket line consisted of twenty-nine men who walked in pairs (Rec. p. 25) five or six feet apart for a distance of fifty to one hundred feet north to south and back again and on the gravel portion of the highway adjacent to the place where work was going on. Some ten or fifteen of these pickets (Rec. p. 25) carried banners upon which the following legends appeared: "Dont be a Scab"; "Shasta County Construction Workers Local 260"; "C. I. O. picket line"; "This job is unfair to C. I. O." (Rec. pp. 68B-68E).

In the ordinance involved herein the legislative body of the County included a lengthy statement of the reasons which impelled its adoption. The complete ordinance is found in the record (Rec. p. 68A). It is stated by the Board of Supervisors that they were compelled to pass the ordinance because of disputes and differences which had re-

cently arisen in the County by reason of the reclamation work and the influx of skilled labor and the trade unions back of labor; that the employers, the employees, organized labor and different groups and factions of employees were at war; that these disputes and differences had created and increased a spirit of violent animosity between individuals and groups; that this warlike atmosphere had resulted and continues to and threatens the peace of the County because coercion, picketing and all manner of violence have taken place. The Board of Supervisors then proceed in the ordinance to give the facts leading to their conclusion which they say are as follows: That in the opinion of the board of directors the majority of the employees in the County do not wish to belong to trade unions because the employees themselves cannot dictate the policies of the local union, but they are compelled to abide by the rules and regulations already established and to the dictates of the unions leaders; that they may be compelled to go on strike even though it may be against their individual interests, with the result that they will be thrown out of work and may become public charges; that the trade unions are compelling them to join the union not by peaceful methods but by force, coercion, violence and fear; that their individual wishes are not being regarded, and that their destiny as workers are being interfered with by the trade unions; that one of the means used by the trade unions to accomplish the purpose of compelling the employees to join the trade unions is by picketing the places of business in the County; that such picketing has and will foment resistance to union activities generally, with the result that there has been and will continue to be open violence, riots and mob action, which has and will endanger the lives, health, property, comfort and peace of the community.

It is apparent from an examination of the ordinance (and what we deem to be a reasonable inference from the record), that what happened in this County was that the reclamation project had the tendency to convert this agricultural community into a semi-industrial county; that since the work started skilled labor came into the community seeking work on the project, and became temporary residents of the County during the time that the reclamation work was going on; and that in back of the employees came the organizers for the two trade unions, to-wit: American Federation of Labor and Committee on Industrial Organization; that these organizers immediately became active and sought membership in their respective trade unions and trade union activities took hold; that the trade unions were competing between themselves for membership; and calling and maintaining strikes in this competitive campaign. The record does not contradict the factual statements appearing in the ordinance. As a matter of fact the immediatee controversy leading to the picketing was not one involving wages, hours of labor or working conditions of the employees or collective bargaining in principle. It was simply a controversy between the two national unions and the employer as to whose members he would employ; it clearly appearing that the employer was willing to recognize the trade union as the bargaining agency.

Summary of Argument.

I.

In dealing with employer and employee relationships and except as limited by the interstate commerce grant of power to the federal government) States should have a wide field of discretion in the exercise of police power. These relationships are purely State problems; the constitutional guarantee of freedom of speech is not absolute and has its limitations. The States should have the right to regulate the method and means of publicity as well as the use of the public streets.

Truax v. *Corrigan*, 257 U. S. 312.

Gitlow v. *New York*, 268 U. S. 652.

Near v. *Minnesota*, 283 U. S. 697.

West Coast Hotel Co. v. *Parrish*, 300 U. S. 379.

Labor Board v. *Jones & Laughlin Steel Co.*, 301 U. S. 1.

Senn v. *Tile Layer's Union*, 301 U. S. 468.

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Thornhill v. *Alabama*, Case No. 514, October Term, 1939. Supreme Court of the United States.

Swing v. *A. F. of L.*, 372 Ill. 91.

Hardie Tynes Mfg. Co. v. *Cruise, et al.*, 66 So. 657.

McKay v. *Retail Automobile Salesman's Union*, 89 Pac. 2nd, 426.

Davis v. *Massachusetts*, 167 Mass. 43.

Anti Picketing Ordinance of Shasta County, California.

II.

The end sought to be attained by the trade union was unlawful under the substantive law of the State of California. The means were made unlawful by the ordinance.

McKay v. *Retail Automobile Salesman's Union*, 89 Pac. 2nd, 426.

III.

The effect of the upholding of the right asserted by the trade union would be to declare what should be the substantive law of twenty-two States which do not have legislation dealing with labor conflicts; and in some instances, the effect would be to declare a substantive law contrary to the common law of the State.

Hardie Tynes Mfg. Co. v. *Cruise, et al.*, 66 So. 657.

ARGUMENT.

I.

In dealing with employer and employee relationships (and except as limited by the interstate commerce grant of power to the federal government) States should have a wide field of discretion in the exercise of police power. These relationships are purely State problems; the constitutional guarantee of freedom of speech is not absolute and has its limitations. The States should have the right to regulate the method and means of publicity as well as the use of the public streets.

This case and the case of *Thornhill* v. *State of Alabama*, No. 514, were argued orally and submitted to this Court at the same time. The legal issues in the two cases are the same.

A determination of the issues involved will affect all intrastate business in the United States in connection with both the statutory and substantive law in many of the States. The importance of a decision and opinion in this case is emphasized by the following:

(a) According to an article written by Professor Paul Douglas in the "Iron Age," in the issue of April 6, 1939, there are approximately 1,300,000 persons engaged in intrastate business in the United States who employ nine or less people;

(b) There are approximately 10,000,000 people employed in the forty-eight States in purely intrastate endeavors who can be members of trade unions under the present by-laws and rules of the unions. This figure is

arrived at in the following manner: Taking the census of business prepared by the Bureau of Labor in 1930 and estimating the increased number of persons employed, less the present estimated unemployment, it appears that there are approximately 36,000,000 people actually employed in the United States at the present time. These include employers doing their own work, agricultural employees, professionals and domestic servants. In the first annual report of the Administrator of the Wage and Hour Law for the calendar year 1939, it appears that there are 12,500,000 people employed who are engaged in interstate commerce and subject to the act. There are approximately 14,000,000 people engaged in agricultural, domestic and professional work in all of the States. These persons cannot become members of the national trade unions. Therefore, the resultant figure of 10,000,000 represents the people engaged in intrastate business and subject to trade union membership. Of these 10,000,000 people, 4,800,000 consist of clerical help who are employed in trades and businesses which are in the main retail businesses engaged solely in intrastate business; a part of these 10,000,000 are members of either national or local trade unions.

(c) There are 22 States which do not have legislation dealing and treating with labor conflicts. The subject is dealt with under the common law of the State. Of these States, Alabama and a few others have declared as a matter of substantive law that peaceful picketing under any and all circumstances is unlawful, regardless of whether or not the purpose of a strike is lawful or unlawful;

(d) 12 of the States have legislative enactments similar to the Federal Norris-LaGuardia Act; 14 States have acts

similar to Section 20 of the Clayton Act. In 1939 Wisconsin repealed its little Norris-LaGuardia Act and went back to the Clayton Act; Oregon after trying the Norris-LaGuardia Act for five years has enacted a modified Clayton Act, which act was passed as a result of a referendum of the people. In Oregon, the people by referendum directed the repeal of the Norris-LaGuardia Act. Therefore, in addition to the 22 States which have no legislation, in 14 of the States no strike is lawful in its purpose unless there is an immediate relationship of employer and employee present at the time of the strike. In other words, trade unions as such and in which none of the employees of a plant are members, have no right to picket, and picketing would undoubtedly be declared unlawful if maintained by the trade unions themselves, as in Illinois and California. (*Swing* v. *American Federation of Labor*, 372 Ill. 91; *McKay* v. *Retail Automobile Salesmen's Union*, 89 Pac. 2nd, 426.)

If this Court renders a decision and opinion which will sustain the asserted right claimed by the trade unions in these cases, such opinion will vitally and materially affect the employer and employee relationships in practically all of the common law States, as well as in the States which have prototypes of Section 20 of the Clayton Act; in all approximately thirty-six States.

The issues as made by the record and briefs filed in this Court are as follows:

THE TRADE UNIONS' POSITION.

The trade unions ask this Court to declare as a national policy that picketing *per se* under all conditions, facts and circumstances, is guaranteed as a liberty under the due

process clause of the Fourteenth Amendment; and they (by logical inference from their arguments) say that this liberty is guaranteed to them and their members regardless of whether a particular strike is called for a lawful or unlawful purpose, and irrespective of the fact that none of the employees of a particular plant are members of the trade union and where the strike is called solely for organization purposes and to compel both the employees and employer to recognize a particular trade union as the bargaining agency. They seek to have imposed on both the common law and Clayton Act States a definition of labor dispute, such as is found in the Norris-LaGuardia Act of the Federal Congress by a decision and opinion in these two cases. They ask this Court to override the common law of the State of Alabama in furtherance of which the act of the legislature attacked in *Thornhill* v. *State of Alabama* was passed; (*Hatdie-Tynes Mfg. Co.* v. *Cruise, et al.*, 66 So. 657); it appears from a reading of the opinion in this case that under the common law of the State of Alabama peaceful picketing *per se* is unlawful, and the statute was passed making it a misdemeanor to picket peacefully. They contend that this right which they ask for is the liberty of freedom of speech because the picket line is used to disseminate information; and they say that this Court is committed to a recognition of this right by reason of the language appearing in the opinion of this Court in *Senn* v. *Tile Layers Union*, 301 U. S. 468, wherein at page 478, it is said:

> ". . . Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

They ask this Court to make this pronouncement clearer and more positive and to declare with certainty and without equivocation that this right is a "liberty" of freedom of

speech. They therefore argue that the legislation in the case at bar and in the *Thornhill* case is unconstitutional on the face of the legislation and is violative of these freedom of speech rights and guarantees.

THE POSITION OF THE STATES OF CALIFORNIA AND ALABAMA.

The State of Alabama joins issue and says; that the legislation in question was passed in recognition of the common law of the State which makes peaceful picketing unlawful as a means to attain either the lawful or unlawful purpose of a strike. Both the States of California and Alabama further say that power to deal and treat with labor problems are essentially local problems and matters over which the States themselves have complete control; that except where the Federal Congress has passed legislation dealing and treating with the problem in connection with the interstate commerce clause of the Federal Constitution, this Court has repeatedly said that the problems are local problems; and they say that this Court is further committed to the doctrine that the States should have a wide latitude in their exercise of sovereign police power and to determine for themselves what is necessary to protect and preserve the health, safety, morals and welfare of their people. The States further assert that under the decision and opinion in the case of *Senn* v. *Tile Layers Union, supra,* this Court recognizes that the freedom of speech guarantee of the Fourteenth Amendment and in labor cases is not limitless but limited; and they say that this right of limitation by regulation is recognized by the following statement appearing in the opinion and immediately following the statement hereinabove quoted, and which bespeaks of freedom of speech:

> "The State may in the exercise of its police power regulate the method and means of publicity, as well as the use of the public streets."

Both States further say that their legislation does not in any way attempt to put a previous restraint or license upon the right to speak freely; that the legislation merely regulates the method and means of publicity and the use of the public streets in a private controversy between two parties wherein both are attempting to further their private interests, and wherein the public is usually harmed by reason of the private conflict between the parties. They say that this legislation is merely a regulation dealing with freedom of speech not generally but at a particular place; to-wit: the place where the conflict takes place; that under the legislation, the trade union and the employer has each and every right of freedom of speech granted by the Constitution to espouse their cause everywhere else in the community and without any limitation or even regulation. The States further say that this regulation is reasonable, taking into consideration experience in connection with labor conflicts; that the ordinance involved in the instant case clearly shows what the contemporary, economic and social conditions are in the County in question. The States further say that they have the power to determine the needs of the people of their State, and that the wisdom of legislation is not the subject matter of review by this Court; and they finally say that the State has the right to protect the propery and civil rights of the employer, as well as the property rights and civil rights of the employees; and may without being charged with being unreasonable or arbitrary, pass legislation which recognizes the rights of both parties where they both come into play in a given case and as they invariably do in every case involving a strike and picketing. They say that the right of the employer to have the use of the public streets for free access of his employees and those who trade with him, uninterrupted by a picket line, is a right which should be recognized. They concede also that the right of the employees to disseminate information as to

their cause is also a right which must be recognized; but they say that breaches of the peace, violence, intimidations and threats and from a long experience leads them to the conclusion takes place at the point of conflict, to-wit: the place of business and where the labor union always maintains its picket lines; that such breaches of the peace affect the well being, safety and health of all of its citizens; that after all, both parties seek to use the public streets not for the ordinary public purpose of travel but for the purpose of airing out their private difficulties, and that the title to the streets is not held by the State for the purpose of permitting the airing out of private contest, but solely for public use of travel. By this legislation they say that no attempt is made to deprive anyone of the right to speak freely; and they further say that laws must be passed to protect alike all persons living in the State regardless of their financial of social position or condition; and that the State is not required to pass legislation which will permit the exercise of the right at a given place because that place is the place which one group of citizens finds to be the best place to most effectively further their own private ends. Both States further say that experience has taught (as we shall hereafter demonstrate) that it is not unreasonable or arbitrary in labor cases to treat with the question of breach of the peace on the basis of passing legislation to prevent breach of the peace at a given place, to-wit: the place of contact, rather than treat and deal with breach of the peace after it occurs; that experience over a period of years has demonstrated that in labor conflicts treating with breach of the peace after it has occurred, by arrest of the violators, does not act as a deterrent; that in practice the public is continually and continuously subjected to being interfered with in the use of the public highways, and that arrests and punishments of the trade union pickets does

not have the effect of deterring or stopping the continuing of breach of the peace and violating of police regulation or legislation.

Taking these issues as made, we now address ourselves to the interpretative decisions of this and other Courts treating with the legal principles involved.

THE GENERAL PRINCIPLES.

These general principles are (first); to what extent can the States limit the freedom of speech liberty as protected by the Fourteenth Amendment; (second) are the limitations or regulations found in the ordinance in the case at bar a reasonable or arbitrary exercise of police power; and (third) what has this Court declared to be the limitation of police power of the States under the due process clause of the Fourteenth Amendment.

We submit that this Court is definitely committed to the doctrine that the cardinal principle invoked in construing legislative enactments is to save and not to destroy; that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, it is the plain duty of this Court to adopt that which will save the Act. (*Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 30.)

The due process clause does not interfere with the inherent sovereign right of a state to treat with labor problems. The problem of involving conflicts between employers on one side and trade unions on the other, is essentially a State problem; it does not became a Federal problem unless and until the Congress of the United States has passed legislation under the granted powers in interstate commerce clause of the Federal Constitution (*Senn* v. *Tile Layers Union*, 301 U. S. 468, 481; *West Coast Hotel Co.* v.

Parrish, 300 U. S. 379; dissenting opinions in *Truax* v. *Corrigan*, 257 U. S. 342, 376).

We therefore submit that each State has the right for itself to determine and declare what is a lawful or unlawful purpose of a strike; and what are lawful or unlawful means which may be used in accomplishing the end sought to be attained by a strike; that it must be conceded that the State of Alabama has the constitutional right, to declare as a matter of substantive law, that peaceful picketing is *per se* unlawful, regardless of whether the purpose of the strike is lawful or unlawful; that the Fourteenth Amendment does not in any way diminish or take away this right from the States (*Senn* v. *Tile Layers Union*, 301 U. S. 468; dissenting opinions in *Truax* v. *Corrigan*, 275 U. S., 342, 376; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379).

When this Court is called upon to pass upon the constitutionality of legislation and in cases wherein it is charged that the legislation on its face is a denial of due process, and particularly in the cases involving labor relations, this Court has recognized the foregoing fundamental precepts and has examined the legislation solely for the purpose of determining whether the legislation reasonably or arbitrarily takes away the basic rights of property or liberty as protected by the Fourteenth Amendment. It will be recalled that this Court is committed to the doctrine that the State may, almost without limitation, cut down the property right. This we say is a reasonable deduction from the opinion of this Court in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, wherein this Court refused to strike down the minimum wage law for women of the State of Washington, and overruled a previous decision of this Court which declared that such laws unconstitutionally impair the property right, by arbitrarily

limiting the free right to contract by both employer and employee.

Up until the case of *Gitlow* v. *New York*, 268 U. S. 652, decided in 1925, this Court refused to recognize that the Fourteenth Amendment imposed any restraint upon the States with reference to the right of freedom of speech. In *Gitlow* v. *New York* and in all of the cases brought to this Court since that time and with the possible exception of the case of *Lovell* v. *Griffin*, 303 U. S. 444 and the *Leaflet* cases, particularly the Milwaukee ordinance case found in *Schneider* v. *State*, 84 Law Ed. p. 115, involved legislation which defied the historical basic precept and purpose of the First Amendment to the Constitution of the United States. In all of these cases the legislation attempted to create a previous restraint on publishing or speaking freely. In the case of *Near* v. *Minnesota*, 283 U. S. 697, this Court construed the act as having the effect of creating a previous restraint. In *Lovell* v. *Griffin* and in the *Leaflet* cases, *supra*, this Court approached the problem from a broad basis and staunchly and zealously guarded the freedom from restraint so that it may not be later contended that this Court is committed to the doctrine that previous restraints might exist, as to the free discussion of purely governmental and political subjects. Even then, this Court recognized that there may be limitations; that the right is not absolute. One of the limitations recognized by this Court is where force is advocated or espoused; and it has been said by this Court that where there is a clear or present danger of violence or force in the use of the words, that legislation passed to guard against such use of force may even provide for previous restraints. In the labor cases, we submit that where either the end sought to be attained by a trade union or the means used consist of the advocacy or reasonably tend to have an immediate

danger of the use of force, that legislation protecting against such possibility is valid and not unconstitutional.

We shall hereafter demonstrate that the legislation here and the facts of the case as applied indicate that the use of force was one of the cardinal purposes that the legislation sought to guard against; and that the facts reveal a clear and present danger of force.

At no time has this Court been called upon to pass upon the right of freedom of speech where he who sought protection of the Fourteenth Amendment by asserting this right, was seeking this protection in the furtherance of his own private ambitions. The labor unions here, and it must be conceded that in all picketing cases where picketing is used as a means to promote an ultimate end, the ultimate end is one where the trade unions seek to accomplish a purpose which is wholly private with it and its members; it seeks to gain a position which will further its own personal and private ends as against the employer. In the case at bar the labor union does not assert the right to speak freely because it wishes to exercise what is purely a public right, but solely to compel the employer to sign a contract with it under which the employer will recognize the trade union as the bargaining agency of the employees. Can it rightfully be said that the freedom of speech guarantee as found in the First Amendment and as absorbed into the Fourteenth Amendment by the decisions of this Court was ever and is now intended to protect private parties in their personal ambitions. Certainly from a historical standpoint, the First Amendment was never intended to protect such an asserted right. Can it be said that a legislature is denied the right under the freedom of speech guarantees of the Fourteenth Amendment to regulate the use of the public streets for the purpose of one's private desires and ambitions, when it is and

always has been recognized that title to the public streets is held by the sovereign State for the purpose of permitting free and uninterrupted public travel? We respectfully submit that such an interpretation of the freedom of speech guarantees was never intended by the framers of the First Amendment and by those who have fought for this right throughout the one hundred fifty years of our existence. If this be a right, then no State, as was said by this Court in *Davis* v. *Massachusetts*, 167 Mass. 43, could end the right of the public to enter upon a public street by putting an end to the dedication for public uses, which right has always been recognized as a basic right of the State.

The trade unions in the case at bar seek comfort in the fact that in the so-called Milwaukee ordinance case (*Schneider* v. *State*, 84 Law Ed. p. 115) the defendant was distributing circulars advising the public of the unlawful practices of an employer. From this they draw the conclusion that this Court is committed to the doctrine that there can be no regulation of a right to the use of the public highways for what they say is the dissemination of information. We respectfully submit that the approach made by this Court to the questions involved in the *Milwaukee* case were not based on the basis of a picket line or of a labor dispute, but that this Court treated the question on the broad basis of previous license or restrain of freedom of speech. This Court apparently was of the opinion that if there were two ways of treating with an offense, that that way which would not in any way restrict or limit freedom of speech should be used; and accordingly said that punishing the offender rather than the one who distributes was the way that the City of Milwaukee should have handled the situation, rather than by general ordinance covering all public streets denying the free right of the dissemination of information.

We shall hereafter discuss this question, but at this time we submit to the Court that in the picket cases, punishing a breach of the peace after it has taken place is not the reasonable, fair or practical way of serving the public interest; experience has taught that the best and practical way, and perhaps the only way of serving the public interest, is by preventing the happening of a breach of the peace rather than punishing the breach after it has happened. However, we reiterate that private ambitions and solely private desires cannot and should not be made the basis of striking down legislation which seeks only to regulate the right to speak freely at *one given place and not generally* in the community. In the Milwaukee ordinance case, the denial of the right was on all of the public streets and highways; it was not a denial of the right to distribute handbills in a particular place—in front of the place of business of the employer; it was perhaps too general and this Court therefore refused to sustain the validity of the ordinance.

Most singularly the issues of this case were perhaps anticipated by one of the judges who wrote a dissenting opinion in the case of *Truax* v. *Corrigan*, 257 U. S. 312, 348. The learned judge in his opinion and in dealing with the problems involved in the case at bar, in principle, said as follows:

> "* * * And just as the States have a broad discretion about establishing police regulations, so they have a discretion, equally broad, about modifying and relaxing them. They may adopt the common law, or some other system, as their own judgment of the interests of their people may determine. They have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transac-

tions within their borders; and in regulating its internal affairs a State may establish by legislation a policy differing in one or more respects from those of other States, just as it might establish a like difference through the decisions of its courts.

"Hence, I have no doubt that, without infringing the 'due process' clause, a State might by statute establish protection against picketing or boycotting however conducted, just as many States have done by holding them to be contrary to the common law, recognizing a property value in a going business, and applying equitable principles in safeguarding it from irreparable injury through interference found unwarranted * * * And, just as one State might establish such protection by statute, so another State may by statute disestablish the protection, even as States have differed in their judicial determination of the general law upon the subject. In neither case can I find ground for declaring that the State's action is so arbitrary and devoid of reasonable basis that it can be called a deprivation of liberty or property without due process of law, in the constitutional sense. In truth, the States have a considerable degree of latitude in determining, each for itself, their respective conditions of law and order, and what kind of civilization they shall have as a result."

Of late years this Court in attempting to set up the tests of reasonableness or arbitrariness of legislation, has apparently adopted the language and reasoning found in one of the dissenting opinions in *Truax* v. *Corrigan*, 257 U. S. at page 354; and it appears to us that one of the cardinal tests which this Court has committed itself to follow is to make an examination of the economic, social and political conditions in the community so as to arrive at an under-

standing as to the reasons, motives and purposes of the legislation; that it is recognized by this Court that the cold words of legislation cannot and should not be of themselves the true test. And accordingly, it must be recognized that if the economic, social and political situation in a community is to be a standard or test, the law must be ever changing; and it must be further recognized that the rules governing the contest change from time to time because conditions themselves change; that therefore there are and should be but few laws which can have universal application. Experience always enters into the picture: Putting the legislation and the facts in this case to the test of experience and the economic, social and political situation in the county at the time the ordinance was passed and at the time of the arrest of the defendant, we respectfully submit that the ordinance of itself bespeaks of a condition of unrest in the community, brought about by a changed social and economic life in the county. A farming community is suddenly turned into a semi-industrial community; from a family of farmers the community becomes partly a family of industrial workers and partly farmers; laborers suddenly come into the community and seek work; with the laborers there comes in union organizers who are sent in for the purpose of unionizing both the labor and the employer; of obtaining union members and compelling the employer to recognize the union. On top of all of this, the two national unions are competing with each other, and, as is evidenced by this record, fighting for membership and recognition; each one espousing his own cause and attempting to keep the other from gaining a foothold. The result is, as this ordinance says, that strife takes place; the attack is made from all fronts, and in the attack there is violence, intimidation and threats. The situation does not present a picture where employees as a class seek the benefit of the trade union for their collective bargaining purposes; the

trade union seeks the employee; it seeks by one method or another to compel him to become a member of the trade union; the trade union seeks to compel the employee so as to force the employer; and when one trade union finally gains a foothold and perhaps a contract, then the other trade union runs a picket line against both the employer and the trade union; and as in the case at bar the employee who is working and who is a member of a trade union is charged with being a "scab" and in a picket line they carry banners containing the legend "Don't be a scab." To the public, the word "scab" has a definite and accepted meaning, to-wit: that those employed are strike breakers, and that he who employs is unfair to union labor, and as such he is employing strike breakers. It is no wonder that the legislative body of the community seeks to protect the community and the persons who have undoubtedly lived in the community for many years from the possibility of being the innocent subjects of breaches of the peace, violence, etc., and to keep what has been the peace in the community.

The ordinance in the case at bar bespeaks of previous happenings of breaches of the peace, violence and intimidation, and of the reasonable expectation and fear of subsequent happenings of what might be called a part of a "local war." The ordinance in question does not in any way attempt to limit the right of freedom of speech. Consistent with what the legislative body thought was a wise way to handle the situation, it merely regulated the right at the place where common experience has taught is usually the place where the conflict takes place, and usually the place, if there is going to be a breach of the peace, where such breach of the peace will occur. The ordinance does not deny the right of the trade union or its members to espouse its cause anywhere else in the community, and

even on the principal public square of the county seat, which is two miles away; it does not prevent the passing out of circulars anywhere in the county, even at the place of employment. As far as a reading of the ordinance itself is concerned, the defendant and his colleagues could go three or four blocks from the place of business and there stop everyone who might be employed, or who might seek employment, or who might be on his way to trade with the employer; it might even conduct and enforce a secondary boycott. The trade union members could even go to the homes of the employees and employers and there urge their cause; and insofar as the ordinance is concerned, can there even commit a breach of the peace by threats, intimidation, etc.

The record in this case is clear. If the legislation is valid on its face or as applied to the defendant and the facts in the case, it did not deny him due process at law, he was properly found guilty. It was admitted that the purpose of the picket line was to induce the present employees to quit their jobs and keep prospective employees from seeking employment. The ordinance made picketing for such purpose a misdemeanor. Therefore, if the legislation is valid, the conviction order was proper.

The trade unions say that the right of freedom of speech is the right to speak freely whenever and wherever they deem it for their best interest so to do; that experience has taught them that the most effective place to espouse the cause of a strike is at the place of employment and by means of a picket line; and that therefore they are entitled to be protected in that way which they think is the most effective way of gaining their ends; and they apparently urge and argue that if the States wish to legislate on the subject and in connection with punishing for breaches of the peace, legislation should take the form of punishing

after the breach has occurred. In other words, they say: "punish him who breaks the peace, but you can't pass legislation which punishes before the breach actually takes place."

The lesson of experience teaches otherwise; we cannot shut our eyes to what is going on in this country in connection with labor disputes and the present form that the contests are taking. This case is typical—two national unions fighting with each other. If the employer contracts with one of the unions, the other pickets and charges him and his employees with being "scabs"; if he contracts with the other, the first one pickets his plant. To say that he is not injured is not to speak the truth. Common experience teaches that every picket line causes an injury to the employer; to say that the picket line is maintained merely for the purpose of disseminating information is but a half truth; the picket line is placed for the purpose of disseminating information, but it is also there even if peaceful, for the purpose of a silent threat to both the customers and the employees of a plant; and primarily for the purpose of injuring the business of the employer. We submit that this is the ultimate purpose; to injure the employee so as to bring him to his knees and deal with the union is its main purpose. The running of the gauntlet of a picket line is not a pleasant task for either the employee or persons who seek to trade with the employer, be it ever so peaceful; especially a picket line consisting of twenty-nine people.

An examination of court records and of the thousands of contempt cases appearing in the annals and records of our police courts and of our reported decisions, demonstrate that the zealousness of the cause of a strike has not in the past deterred those who picket, by arresting them after they commit breaches of the peace. We respectfully

submit that experience in this country teaches us that when there are breaches of the peace in the picket lines, arrest, punishment and fines have not in any degree stopped the breach of the peace—to the contrary, the community and the public seeking travel on the public highway is always subjected to the breach of the peace, and arrests, fines and punishment have not acted as a deterrent.

We therefore respectfully submit that by the ordinance in question, the legislative body took that path which was a reasonable path to take; that the best interests of the public were served by seeking to regulate the picket line by preventing the possibility of a breach of the peace at the place where the breach, as experience has taught, will most likely, ordinarily and usually take place.

The trade union also takes the following position: That a denial of the right to carry banners and disseminate information by a picket line at the place of business is in effect a denial and limitation of the right itself in labor cases, because they say that the trade unions are never in good financial condition; that they do not have the financial ability or means to disseminate information in any other way; and that therefore they should be given the right to maintain their picket lines, if for no other reason; and that if there is any injury or damage to the employee, it is but an unfortunate circumstance brought about by economic conditions. We deny that this is a correct statement of fact in 1940. Before demonstrating that what we say is true, we respectfully suggest that this argument presupposes an injury to the employer. If the trade unions seek to espouse their cause and injure the employer, they at least should be asked to take the consequences of this injury by being responsible in damages to the employer for such injury. No legislature could pass a constitutional law under which a man could be seriously injured with-

out at least providing for some means of redress for the injury. The trade unions have accordingly always said that extraordinary process of injunction should not be permitted and that the employer should be relegated to his ordinary remedies. Let us put this argument to the test of common experience: The national trade unions have not and cannot be put, by reason of their organization set-up, to the responsibility for damages caused to an employer. Strikes and the contest are always conducted by local trade unions; this local trade union is always a loose, voluntary organization having no duty to the State government to make reports showing its financial condition; having no duty to publish financial figures, income, disbursements or otherwise; its financial position or condition is always in the hands of its officials; it usually owns no physical property and its affairs are and remain solely in their "vest pocket," (if we may be permitted to use a frank paraphrase). How can such an organization be compelled to respond in damages? The past has taught us that it is almost impossible to collect judgments against trade unions—much less discover who are their members. Being voluntary organizations, they must be treated as joint associates, and all of the members must be made parties to any proceedings against them. The mere statement of the necessity for so doing bespeaks of the difficulty which always arises in an attempt to bring ordinary civil common law actions against them for damages. If the labor unions want the right to injure and to take their chances thereby, they must be willing to accept responsibility and should put themselves in a position where they will respond in damages for injuries sustained or likely to be sustained by virtue of their private activities. This is not what they offer; they ask for the right without offering to accept responsibility for the abuse thereof.

This must be recognized in dealing and treating with the problems presented in the case at bar.

For many years the trade unions have taken advantage of the basic precept of democratic government: "that the weak must be protected against the strong." Therefore, we have heard for the past fifty years that the employees, individually and collectively in their trade unions, are financially weak compared to the financial strength of the employer, individually and collectively. Our legislators and our courts have recognized and have given force and effect to this argument, with the result that the trade union movement has been given life and strength by our legislators and our courts. Are they, in 1940, the weak and undernourished child in the family, needing special attention, or are they strong enough to take care of themselves?

In answer to the question, we submit the following figures showing the potential and financial strength of the five large national trade unions in this country:

By the end of 1938, the American Federation of Labor claimed a total membership of approximately 3,600,000 in its affiliated unions; the C. I. O. claimed a membership of approximately 4,000,000.[1] It is common knowledge that the three large unaffiliated unions (Railroad Brotherhoods, International Garment Workers, and Printing Unions) had a total membership of 1,500,000, making a total membership of approximately 9,100,000 in the five large unions. At the end of 1937, the American Federation of Labor

[1] "Report of Executive Council A. F. of L., 58th Annual Convention," (Oct. 3, 1938) Houston, Texas; "Report of John L. Lewis to First Constitutional Convention of C. I. O." (November 14, 1938) p. 11—covering a period from the Organization of the C. I. O. to November 1, 1938.

claimed a membership of approximately 3,200,000; the C. I. O., 3,800,000, and the three large unaffiliated unions, it is estimated, had approximately 1,500,000 members. Thus, the American Federation of Labor in one year's time increased its membership by 400,000; the C. I. O. by 200,000, making a total increase of 600,000 in membership in one year. There were 40,000,000 persons gainfully employed in the United States at the end of 1937;[2] of these there were approximately 10,000,000 employed in agriculture and an additional 8,000,000 were employed in professional work and as domestic servants, making a total of 18,000,000 gainfully employed who were not eligible to trade union membership.[3] *Therefore, the five large unions represented 23% of all persons gainfully employed in the U. S. and approximately 41% of all of the gainfully employed persons in the United States who were eligible to trade union mem-*

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[2] "Report of Executive Council A. F. of L. to the 57th Annual Convention," Denver, Colo. (Oct. 4, 1937) p. 10; Elsie Gluck, "Introduction to American Trade Unionism," 1937 Supp. Additional figures—C. R. Daugherty—"Labor Problems in American Industry," 1933, p. 499.

Year	A. F. of L. Membership	Union Membership
1897	264,825	447,000
1904	1,676,200	2,072,700
1906	1,454,200	1,958,700
1910	1,562,112	2,184,200
1913	1,996,004	2,753,400
1917	2,371,434	3,104,600
1920	4,078,740	5,110,800
1923	2,926,468	3,780,000
1928	2,896,063	3,449,100
1931	2,889,500	3,298,000
1934 Estimated	4,000,000	5,000,000

[3] Woytinsky—"Labor in the United States," 1938, chart. p. 308-311—It will be noted that this chart is based upon

bership. Over a period of three years and from 1934 to 1937, trade union membership increased by 4,000,000. From 1931 to 1937 trade union membership in these large unions increased by approximately 6,000,000.[4] In 1931, trade unions represented approximately 9% of the totally gainfully employed persons eligible to trade union membership, employed in the United States, so that over a period of six years and while industry was going through a depression and suffering tremendous loss of capital, trade union membership increased by 32%.

From a standpoint of gross income; if each member of a trade union pays $10.00 per year as membership dues, the total income of trade unions in United States would be approximately $90,000,000. However, it is common knowledge that trade union dues and initiation fees are far in excess of $10.00 per year. It is not unusual practice for trade unions to have initiation fees which run into

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the official "Report of the United States Census Bureau for the 1930 Census."

The figures quoted above are an estimate giving due regard to the fact that unemployment has increased since 1930. It will be noted that the chart cited shows that the total number of persons gainfully employed in the United States in 1930 was 48,829,920 whereas our figure for 1937 was 40,000,000. The latter figure is taken from an estimate made by Herbert Harris in his book, "American Labor," 1939 p. 359.

It is a matter of common knowledge that the number of persons employed in agriculture, professional work, domestic and service pursuits was greater in 1930 than in 1937. Therefore our percentage figures that follow represent an extremely conservative conclusion. Since these figures are estimates we attempt to be as conservative as possible.

[4] Harris, "American Labor," 1939 p. 359; Gluck, "Introduction to American Trade Unionism," 1937 Supp. p.

hundreds of dollars per member.[46] Such an income is far in excess of the gross receipts of even some of our large industrial institutions. The American Federation of Labor had an income of approximately $1,185,000 between August 31, 1936, and August 31, 1937. At the end of this fiscal period they had $586,500 in cash on hand, of which $533,000 was set aside as a defense fund to be used for union organization and defense purposes. During the fiscal year, the American Federation of Labor collected close to $750,000 from a general and special per capita tax and from initiation fees; the special tax was collected for special defense fund purposes. The income of the American Federation of Labor for the succeeding fiscal year ending August 31, 1938, was approximately $1,800,000, or an increase of $700,-

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96. In October 1937, total trade union membership was 7,750,000—Gluck op. cit. p. 96. Additional figures show:

Year	Total Persons Employed	Membership in Trade Unions	Percentage of Trade Union Members to Total Persons Employed
1897	26,000,000	447,000	1.4
1910	38,000,000	2,147,200	5.8
1920	42,000,000	5,110,800	12
1930	48,000,000	3,298,000	9
1934	40,000,000	5,000,000	12.5
1939 Estimated	40,000,000	9,500,000	23

Harris, "American Labor," 1939, chart p. 359—

It will be noted that the figures used to indicate the number of persons gainfully employed include those persons engaged in agriculture, professions, domestic and service pursuits. If those persons not eligible to membership in trade unions were omitted from our calculations, it must be recognized that the percentage figures shown would be 41% for 1939.

[46] Prof. Paul H. Douglas, "International Labor Review," March 1939.

000 in cash income over the preceding fiscal year. During the fiscal year 1937 to 1938, the American Federation of Labor spent approximately $1,175,000 for organization purposes, which was an increase of approximately $650,000 in expenditures for the same item over the previous year.[5] Office expenses in the fiscal year 1936 to 1937 were $166,800; there was approximately $34,600,000 paid out by the American Federation of Labor and the national and international affiliated unions for death, sick, unemployment, old age and disability benefits during the year 1936.[6] C. I. O. reported that from 1935 to 1938, its organization collected approximately $3,500,000 from members of affiliated organizations. The same amount was spent in its activities during these years. Of this amount, there was approximately $1,600,000 spent for organization purposes.[7] At the end of 1936, the Brotherhood of Locomotive Firemen and Engineers had approximately $25,000,000 in cash and securities on hand.[8] These figures do not include the financial picture of the individual unions affiliated with the national groups which as we have heretofore demonstrated have a gross income considerably in excess of $100,000,000 per year. Therefore, we respectfully submit that based on the foregoing figures it must be conceded that trade unions in the United States not only represent a very large percentage of the working

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[5] "Report of the Executive Council of A. F. of L." Denver, Colo, (October 4, 1937) pp. 5-9; "Report of the Executive Council of A. F. of L." Houston, Texas, (Oct. 3, 1938).

[6] Report of Executive Council of A. F. of L. Convention, pp. 6 and 24 (Oct. 3, 1938) Houston, Tex.

[7] "Report of John L. Lewis to the First Constitutional Convention of C. I. O.," Pittsburgh, Pa. (Nov. 14, 1938) pp. 13, 14.

[8] Pamphlet prepared for the members of the Brotherhood of Locomotive Firemen & Engineers, 1937.

public, but their financial position is such that they can enter the conflict at least on an equal basis with any individual or any group or association of employers.

We respectfully submit, therefore, that the legislation attacked in the case at bar is neither contrary to the due process clause of the Fourteenth Amendment on its face nor has the defendant himself been denied due process under the liberties granted to him by the Fourteenth Amendment.

II.

The end sought to be attained by the trade union was unlawful under the substantive law of the State of California. The means were made unlawful by the ordinance.

We do not wish to further burden this brief with any lengthy discussion of the question as to whether the end sought to be attained by the trade union or the means used were unlawful under the laws of the State of California.

The apparent purpose of the strike was not a purpose which is ordinarily the purpose of the contest. The employees and their trade union representatives were not striking for better wages or shorter working hours, nor were they striking to compel the employer to recognize a trade union as the bargaining agency. The employees here, as testified by the defendant himself, were discharged several weeks before the plant reopened with new help. As he put it, they were "laid off" (Rec. P. 30). They were not discharged because of their affiliation with the trade union or with a particular trade union. The defendant himself testified that he was discharged because weather conditions would not permit operations; the purpose of the strike was to compel recognition of a trade union in which none of the present employees were mem-

bers. Under the decision and opinion of the Appellate Court of California in the case of *McKay* v. *Retail Automobile Salesmen's Union*, 89 Pac. 2nd, 426, such a purpose is not the lawful purpose of a strike. Neither were the means used lawful means. It will be recalled that one of the banners carried (Rec. p. 68B) bore the legend, "Don't be a scab." The words "Don't be a scab" appearing as a legend on a banner carried are in no different category than if orally addressed to an employee; such address has always been declared by our courts to have the effect of intimidation and threat in fact.

We therefore submit that under the facts as they appear in this record, the defendant is asking for the right to speak freely in furtherance of and for the purpose of accomplishing an unlawful purpose; that means used are also unlawful *per se;* and that this course of conduct is force. This Court has said, even in the previous restraint cases, that the legislature has the power to pass legislation which will prevent the use of words or the doing of any act which has the present and clear danger of force. Therefore we submit that even assuming the legislation to be a previous restraint, the ordinance properly limited force.

III.

The effect of the upholding of the right asserted by the trade union would be to declare what should be the substantive law of twenty-two states which do not have legislation dealing with labor conflicts; and in some instances, the effect would be to declare a substantive law contrary to the common law of the State.

We submit that the effect of sustaining the right contended for by the defendant would be a declaration of national

policy, to the effect that all peaceful picket lines may
maintained everywhere in the United States and in
and every State thereof under the freedom of speech gu
antees of the Fourteenth Amendment. 'If the right is s
tained, the effect of such a decision and opinion would
to force onto the States a Norris-LaGuardia Act by judic
legislation; it would have the effect of compelling
twenty-two States, which now treat with labor problems
the basis of substantive law, to recognize the lawfulness
a picket line. The State of Alabama would be compelled
change its common law which now says that peaceful pick
ing is *per se* unlawful. This we say would be an unco
stitutional interference with the sovereign powers of t
States. We respectfully submit that the States have t
right to insist that their power and right to deal with t
problem of labor and labor conflicts is essentially a Sta
power and should not be interfered with by any branch
the Federal Government.

CONCLUSION.

We conclude this brief by quoting from the concurring opinion of this Court in the case of *Graves* v. *New York, ex rel O'Keefe*, 306 U. S. 466-491:

> "The judicial history of this doctrine of immunity (immunity of state employees from federal taxation) is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. * * *"

Respectfully submitted,

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Ross W. Swing as Amicus Curiae.